Internal Revenue Service
memorandum

CC:TL-N-9511-90
Br2:JMSchwartzman

date: NOV - 2 1990

to: District Counsel, Laguna Niguel W:LN

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject: [redacted]

This is in response to your August 3, 1990 request for advice as to the proper party to sign consent forms to extend the statute of limitations and to sign the transferee liability statements.

ISSUES

1. Who are the proper parties to execute Forms 872 extension of time for assessment of a consolidated return group's [redacted] tax year where the common parent of the group no longer exists.

2. Who are the transferees of the common parent and its subsidiaries.

FACTS

Our focus is on the [redacted] income tax liability of the consolidated group whose common parent was [redacted] (the Corporation). During [redacted], the Corporation had [redacted] subsidiaries.

The following events all took place during the closing few days of [redacted].

Near the end of the consolidated group's [redacted] calendar tax year, [redacted] of the [redacted] subsidiaries liquidated into the Corporation. The remaining group members were the Corporation, [redacted], [redacted] (a wholly-owned subsidiary of [redacted]) and [redacted].

After those liquidations, the Corporation contributed the assets held by two of its liquidated subsidiaries to [redacted], ([redacted]) in exchange for a [redacted]% interest in that partnership.

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Next, the Corporation transferred all its assets and liabilities to [redacted] ([redacted]). These assets included the assets previously held by its subsidiaries, as well as the stock in the subsidiaries that did not liquidate and the Corporation's [redacted]% interest in [redacted]. In exchange, the Corporation received a [redacted]% interest in [redacted].

Then, [redacted] contributed the assets formerly held by the Corporation's subsidiary, [redacted], to [redacted] ([redacted]) in exchange for a [redacted]% interest.

Remaining after that were the Corporation, its three (nonliquidated) subsidiaries, [redacted], [redacted] and [redacted].

At this point, the Corporation liquidated by exchanging its [redacted]% interest in [redacted] for the stock held by its shareholders. This was effectuated by usidng [redacted] as an agent to facilitate this exchange.

The Corporation's liquidation caused a termination of [redacted]. [redacted]'s assets were distributed to its remaining partners, [redacted], [redacted] and [redacted] Operating Partners.

[redacted]'s assets and liabilities were then recontributed by the partners to form [redacted] ([redacted]).

As you recall, the Corporation transferred its [redacted]% interest in [redacted] to [redacted]. Consequently, [redacted]'s termination resulted in the termination of [redacted]. Upon the formation of [redacted], [redacted] was also formed by a recontribution of [redacted]'s assets and liabilities.

[redacted]'s termination also resulted in the termination of [redacted]. As was done with [redacted], [redacted]'s assets and liabilities were recontributed to form [redacted].

All in all, what started out as [redacted] and its [redacted] subsidiaries on [redacted], became [redacted], [redacted], [redacted], [redacted], and [redacted] by [redacted].

In [redacted], [redacted] and its wholly owned subsidiary, [redacted], merged into [redacted], which is also owned by the same group of investors.

ANALYSIS

Issue 1. Form 872

Generally, the common parent of an affilaited group electing to file income tax returns on a consolidated basis is the exclusive agent for the subsidiaries in the group for all matters relating to the income tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). When, as here, the common parent no longer exists, the common parent may designate a successor agent (subject to the district director's approval), the remaining subsidiaries may designate a successor agent (also subject to the district director's approval) or the district director may deal directly with any member of the group concerning its tax liability. Treas. Reg. § 1.1502-77(d). Each member is severally liable for tax of a consolidated return year during which it was a member for any part of that year. Treas. Reg. § 1.1502-6(a).

Here, then, [redacted], as the sole remaining subsidiary of the consolidated group, would have been a proper party to sign a Form 872 for its liability for the group's income tax liability, because the Corporation did not designate a successor agent, the remaining subsidiaries did not designate a successor agent and there is reason to believe that the common parent no longer exists.

We understand, however, that the statute of limitations for [redacted] [redacted] tax year has run. We further understand, though, that it has only a very nominal net worth ($[redacted]).

A Form 872 may also be executed by a successor in interest when there has been a merger. As explained in the next section, [redacted] is a successor in interest to [redacted] and [redacted] and, therfore, may excute Form 872 for their [redacted] income tax liabilities.

Issue 2. Transferee Liability--Form 977

When property or assets have been transferred and the transferor was liable for tax, the Code provides a procedure whereby the Service can assess the tax liability of the transferor against the transferee of that property or those assets. This is known as transferee liability. Section 6901. Shareholders of a dissolved corporation and successors in interest of a corporation are included in the definition of transferee. Section 6901(h); Treas. Reg. § 301.6901-1(b).

There are two types of transferee liability, at law or in equity. To sustain liability against a transferee in equity, the Service must prove:

1) that there was a transfer of assets or property;
2) that the transferor was liable for tax;
3) that the transferor is now insolvent;
4) that remedies against the transferor have been exhausted;
5) the value of the assets or property transferred; and
6) the inadequacy of the consideration given for the transferred assets or property.

Transferee liability at law arises when the transferee agrees 1) to pay the obligations of the transferor or 2) where there is an agreement to pay the transferor's liabilities by operation of law.

The law of the state in which the transfer occurs governs the substantive aspect of transferee liability. For example, under California law, a shareholder who receives property on dissolution and complete liquidation of a corporation is liable for the unpaid debts of the corporation to the extent of the value of the property received. Cal. Civil Code § 3439.01.

In our case, it appears that transferee liability by operation of law follows the assets held by the Corporation and its subsidiaries during [redacted] because both the assets and liabilities were transferred. Thus, [redacted] is the transferee of [redacted], which was the transferee of the Corporation and should accordingly execute a Form 977; [redacted] is the transferee of [redacted], which was the transferee of the Corporation; [redacted] is the transferee of [redacted], which was the transferee of the Corporation; and [redacted] is the transferee of [redacted] and of [redacted]. In addition, it also appears that [redacted] is liable for the tax liability of [redacted] and [redacted]

[redacted] as a successor in interest and should, therefore, execute a Form 872, in addition to a Form 977. Of course, it is preferable to have the appropriate transferees sign Forms 2045 Transferee Agreement.

For your convenience, we attach sample Forms 872, 977 and 2045 which you may wish to have executed. The Forms 977 and 2045 executed on behalf of the partnerships should be signed by an officer of [redacted], including the person's name and title, and denoting [redacted] as the Managing General Partner of the entity on whose behalf the person is signing. The Forms 872, 977 and 2045 executed by [redacted] should be signed by an officer of that company.

The liability of a transferee extends the usual three-year statute of limitations by one year. Liability of a transferee of a transferee extends the statute by an additional year, and so forth, up to three years from the expiration of the usual statute of limitations. Given that, you may conclude that execution of the Forms 872 and 977 is not necessary because you will wind up the audit of the Corporation's [redacted] income tax liability before the statute of limitations runs on the transferee liability of these transferees. Nonetheless, Forms 2045 should still be executed to preclude the necessity of litigating the issue of transferee liability.

A partnership can be a transferee of a corporation, but not a successor in interest to a corporation. As a result, the Form 872 and the Forms 977 that were executed with the "successor in interest" language were incorrect. The Forms 872-P that were executed did not refer to the Corporation and only extended the statute of limitations of the partnerships, whereas our concern is with the corporate tax liability of the Corporation. Likewise, three of the four Forms 977 and three of the four Forms 2045 did not refer to the Corporation and are incomplete for that reason. While the Form 2045 naming [redacted] as the transferee of the Corporation may be sufficient, as an extra measure of caution, a reference in such a transferee agreement should indicate that [redacted] is a transferee of [redacted], which was a transferee of the Corporation.

When you begin to deal with extensions for the partnership income tax liabilities for [redacted] and [redacted] and the other partnerships involved, please feel free to contact us for further assistance.

We attach a memorandum discussing the TEFRA implications that direct income tax benefit. Note that transferee liability for the income tax liability of the [redacted] consolidated group is not a partnership item and, therefore, is not subject to the TEFRA partnership rules.

MARLENE GROSS

By:
ALFRED C. BISHOP, JR.
Chief, Branch No. 2
Tax Litigation Division

Attachments:
- Forms 872
- Forms 977
- Forms 2045
- Tax Shelter Branch memorandum concerning TEFRA implications